

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

**In the Matter of** )  
 )  
Applications for Consent to the Assignment )  
and/or Transfer of Control of Licenses )  
 )  
Adelphia Communications Corporation )  
(and subsidiaries, debtors-in-possession), Assignors, )  
to )  
Time Warner Cable Inc. (subsidiaries), Assignees; ) MB Docket No. 05-192  
 )  
Adelphia Communications Corporation )  
(and subsidiaries, debtors-in-possession), )  
Assignors and Transferors, )  
to )  
Comcast Corporation (subsidiaries), )  
Assignees and Transferees; )  
 )  
Comcast Corporation, Transferor, )  
to )  
Time Warner Inc., Transferee; )  
 )  
Time Warner Inc., Transferor, )  
to )  
Comcast Corporation, Transferee. )

**RESPONSE TO DIRECTV'S "SURREPLY"**

**ADELPHIA COMMUNICATIONS  
CORPORATION**

Brad Sonnenberg  
James N. Zerefos  
*Adelphia Communications Corp.*  
*5619 DTC Parkway*  
*Denver, CO 80111*

Philip L. Verveer  
Michael H. Hammer  
Francis M. Buono  
*Willkie Farr & Gallagher LLP*  
*1875 K Street, N.W.*  
*Washington, DC 20006*

**COMCAST  
CORPORATION**

Joseph W. Waz, Jr.  
James R. Coltharp  
*Comcast Corporation*  
*2001 Pennsylvania Ave., N.W.*  
*Washington, DC 20006*

**TIME WARNER INC.**

Steven N. Teplitz  
Susan A. Mort  
*Time Warner Inc.*  
*800 Connecticut Ave., N.W.*  
*Washington, DC 20006*

Aaron I. Fleischman  
Arthur H. Harding  
Seth A. Davidson  
Craig A. Gilley  
*Fleischman and Walsh, L.L.P.*  
*1919 Pennsylvania Ave., N.W.*  
*Washington, DC 20006*

Dated: November 1, 2005

## **TABLE OF CONTENTS**

<b>I.</b>	<b>INTRODUCTION AND SUMMARY.....</b>	<b>2</b>
<b>II.</b>	<b>THE APPLICANTS HAVE DEMONSTRATED PUBLIC INTEREST BENEFITS THAT ARE FULLY COGNIZABLE UNDER COMMISSION PRECEDENT .....</b>	<b>3</b>
A.	The Proposed Transactions Will Facilitate The Important Public Interest Benefit Of Removing a Licensee’s Assets From Bankruptcy .....	4
B.	Contrary to DIRECTV’s Claims, The Commission Has Recognized the Demonstrated Public Interest Benefits of Clustering.....	8
C.	There is No Support for DIRECTV’s Position that the Commission Should Ignore the Benefits That Will Result from Comcast and Time Warner’s Ownership of the Adelphia Systems .....	10
<b>III.</b>	<b>DIRECTV’S SPECULATIVE ASSERTIONS DO NOT DEMONSTRATE THAT TRANSACTION-RELATED HARMS WILL OCCUR IN ANY RSN MARKETS .....</b>	<b>12</b>
A.	DIRECTV’s Arguments Are Based on Flawed Theoretical Premises and Assumptions.....	15
B.	DIRECTV Fails to Identify Additional RSN Markets Affected by the Transactions .....	18
C.	DIRECTV’s “Empirical” Evidence Is Flawed, Misleading, and Incomplete.....	22
D.	The Conduct DIRECTV Criticizes Occurs Even in the Absence of Vertical Integration .....	26
E.	Lexecon’s Findings on DBS Penetration are Fundamentally Flawed .....	29
<b>IV.</b>	<b>DIRECTV’S REMAINING CONTENTIONS LACK MERIT.....</b>	<b>33</b>
<b>V.</b>	<b>CONCLUSION .....</b>	<b>35</b>

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>In the Matter of</b>	)	
	)	
Applications for Consent to the Assignment	)	
and/or Transfer of Control of Licenses	)	
	)	
Adelphia Communications Corporation	)	
(and subsidiaries, debtors-in-possession), Assignors,	)	
to	)	
Time Warner Cable Inc. (subsidiaries), Assignees;	)	
	)	MB Docket No. 05-192
Adelphia Communications Corporation	)	
(and subsidiaries, debtors-in-possession),	)	
Assignors and Transferors,	)	
to	)	
Comcast Corporation (subsidiaries),	)	
Assignees and Transferees;	)	
	)	
Comcast Corporation, Transferor,	)	
to	)	
Time Warner Inc., Transferee;	)	
	)	
Time Warner Inc., Transferor,	)	
to	)	
Comcast Corporation, Transferee.	)	

**RESPONSE TO DIRECTV'S "SURREPLY"**

Comcast Corporation ("Comcast"), Time Warner Inc. ("Time Warner"), and Adelphia Communications Corporation ("Adelphia") (collectively, the "Parties"; Comcast and Time Warner collectively, the "Applicants") hereby respond to the October 12, 2005 "Surreply" of DIRECTV, Inc. ("Surreply").<sup>1</sup>

---

<sup>1</sup> Surreply of DIRECTV, MB Docket No. 05-192 (Oct. 12, 2005) ("Surreply").

## I. INTRODUCTION AND SUMMARY

In its Surreply, DIRECTV claims that the Parties have demonstrated a “fundamental misconception” concerning the Commission’s methodology for analyzing the transactions at issue in this proceeding (“Transactions”) and have failed to demonstrate any benefits or refute any of the harms that DIRECTV has alleged would occur as a result of the Transactions.<sup>2</sup> But, as demonstrated below, DIRECTV’s claims are without merit. In particular:

- The Parties have demonstrated that the Transactions will result in concrete public interest benefits that are fully cognizable under Commission precedent. Contrary to DIRECTV’s claim, the Commission has also recognized that clustering can have pro-competitive, pro-consumer effects. Indeed, the Applicants’ capabilities, proven track records, and geographic correlation to Adelphia’s systems will uniquely enable them to deploy improved and new and advanced services to Adelphia customers. The Transactions also will facilitate the accomplishment of other public interest benefits whose importance has been acknowledged by the Commission, including removing the Adelphia assets from bankruptcy.
- DIRECTV’s speculative assertions do not demonstrate that the Transactions will result in any harm in any particular market for regional sports networks (“RSNs”). DIRECTV primarily asserts that the Transactions could place Comcast and Time Warner in a better position to enter into exclusive arrangements with unaffiliated RSNs, or to form new RSNs and “entice” away professional sports teams from other networks.<sup>3</sup> However, there is no basis for concluding that the Transactions will produce either of these results. In fact, the actions of News Corp.’s own RSNs disprove the alleged causal relationship between the Transactions and certain types of behavior described in DIRECTV’s Surreply. Moreover, DIRECTV’s complaints about two Comcast-affiliated RSNs are based on incorrect information. Likewise, DIRECTV’s complaints that Comcast has used the formation of new RSNs as an opportunity to engage in uniform or discriminatory price increases do not hold up to scrutiny.

---

<sup>2</sup> *Id.* at ii.

<sup>3</sup> *Id.* at 7.

- DIRECTV also submits an anonymous report by Lexecon which purports to provide a statistical analysis of DBS penetration.<sup>4</sup> In the attached Reply Declaration,<sup>5</sup> Professor Ordoover and Dr. Higgins explain that Lexecon never shows that lower DBS penetration leads to competitive injury – for example, in the form of higher prices. Professor Ordoover and Dr. Higgins also highlight several methodological flaws in the Lexecon analysis. Under the circumstances, the Commission should simply disregard the Lexecon report and its conclusions.

## II. THE PARTIES HAVE DEMONSTRATED PUBLIC INTEREST BENEFITS THAT ARE FULLY COGNIZABLE UNDER COMMISSION PRECEDENT

DIRECTV claims that the Parties have a “fundamental misconception” regarding the standard of review for the Transactions.<sup>6</sup> Contrary to DIRECTV’s assertion, however, the Parties have explicitly acknowledged that, under the *Bell Atlantic/NYNEX* standard, “the Commission ‘weigh[s] any potential competitive harms and benefits to determine whether the proposed transaction would promote the public interest,’”<sup>7</sup> and that, in “assessing the potential public interest benefits of a proposed transaction, the Commission ‘focuses on demonstrable and verifiable public interest benefits that could not be achieved if there were no merger.’”<sup>8</sup> The Parties have met this standard in their

---

<sup>4</sup> The Lexecon report does not identify its authors, which raises serious questions about the validity of its arguments and conclusions. Without identified authorship, it is impossible to assess whether the unnamed drafters of this report are qualified to express any of the opinions contained therein. Of course, it is quite clear why the Lexecon authors refuse to identify themselves. Lexecon, in various reports authored by Professor Dennis Carlton and others, argued vigorously in the News Corp./DIRECTV matter against precisely the types of vertical foreclosure and discrimination arguments that Lexecon now anonymously advances in this proceeding. *See, e.g.* Dennis Carlton, Janice Halpern, and Gustavo Bamberger, “Economic Analysis of the News Corporation/DIRECTV Transaction,” Appendix A to Opposition to Petitions to Deny and Reply Comments of General Motors Corporation, Hughes Electronics Corporation, and the News Corporation Limited, MB Docket No. 03-124 (July 1, 2003).

<sup>5</sup> Reply Declaration of Janusz A. Ordoover and Richard S. Higgins (attached as Exhibit A) (“Ordoover-Higgins Reply Declaration”).

<sup>6</sup> Surreply at ii.

<sup>7</sup> Public Interest Statement at 19.

<sup>8</sup> *Id.*

Public Interest Statement and Reply, and their demonstration that the Transactions will provide strong public interest benefits will be underscored by this Response as well.<sup>9</sup>

Contrary to DIRECTV's assertions, the benefits that will arise from this transaction are fully cognizable under well-established Commission precedent, and the Parties have already submitted extensive evidence in this proceeding supporting these benefits.<sup>10</sup> The Parties take issue with DIRECTV's attempt to ignore the acknowledged benefits that will result from the Transactions, and in the remainder of this section address two of these benefits in particular: the beneficial effects of the geographic rationalization, or "clustering," of systems, and the resolution of the Adelphia bankruptcy proceeding. In this section, Applicants also show that DIRECTV's claim that other firms could acquire and improve the Adelphia systems just as effectively as Time Warner or Comcast is both irrelevant and factually wrong.

**A. The Proposed Transactions Will Facilitate The Important Public Interest Benefit Of Removing a Licensee's Assets From Bankruptcy**

In their Public Interest Statement and Reply, the Parties cited a long and established line of precedent in which the Commission has recognized an obligation to consider the underlying policies of the bankruptcy laws when, as here, it analyzes a proposed transaction involving a bankrupt party.<sup>11</sup> In its original comments, DIRECTV acknowledged that "the Commission has an obligation to consider the national policies

---

<sup>9</sup> As the Applicants have previously noted, the fact that the license transfers at issue in the instant proceeding do not constitute a material aspect of the Parties' cable television operations is relevant to the standard of review and, consequently, the Applicants have reserved their right to challenge the Commission's exercise of jurisdiction in whole or in part, including the application of the Bell Atlantic/NYNEX standard of review. Public Interest Statement at n. 56; Reply of Comcast, Time Warner, and Adelphia at n. 156 (Aug. 5, 2005) ("Reply").

<sup>10</sup> Public Interest Statement at 21-71; Reply at 5-23.

<sup>11</sup> Public Interest Statement at 20; Reply at 19-23.

underlying the bankruptcy laws, including the interests of creditors.”<sup>12</sup> In its Surreply, however, DIRECTV changes direction, arguing that the Commission is not required to accommodate the bankruptcy laws or the findings of the bankruptcy court in its public interest analysis.<sup>13</sup>

In doing so, DIRECTV, consistent with a pattern seen throughout its Surreply, entirely mischaracterizes the Parties’ position. Specifically, DIRECTV claims that the Parties believe the bankruptcy laws completely “trump” and must necessarily nullify the Commission’s transaction review process.<sup>14</sup> Of course, no rational party would take such a bizarre position, and the Parties did not do so. Rather, the Parties stated plainly that the Commission’s acknowledged obligation to consider the bankruptcy laws and policies is “an integral *part of* the Commission’s Section 310(d) public interest analysis.”<sup>15</sup> After all, the Commission itself has repeatedly said that, “under its public interest mandate, it has an obligation to consider”<sup>16</sup> the core policies of the bankruptcy laws, including “compensation of innocent creditors,”<sup>17</sup> the “efficient and economical administration of [bankruptcy] cases,”<sup>18</sup> and “a fresh start for debtors.”<sup>19</sup>

DIRECTV’s reason for mischaracterizing the Parties’ position and the Commission’s precedent is readily apparent. A central part of DIRECTV’s story is its

---

<sup>12</sup> DIRECTV Comments at 35.

<sup>13</sup> Surreply at 24-25.

<sup>14</sup> *Id.* at 24.

<sup>15</sup> Reply at 21 (emphasis supplied); *see also* Reply at 22, n. 75 (“Applicants simply suggested that the Commission recognize that the transactions facilitate Adelphia’s emergence from bankruptcy and thereby provide a strong public interest benefit for granting the Applications.”).

<sup>16</sup> *Adelphia Communications Corp.*, 17 FCC Rcd 24544, 24546-47 ¶ 4 & n. 9 (Enf. Bur. 2002) (“*Adelphia Bankruptcy Order*”). *See also San Diego Television, Inc., Debtor-in-Possession*, 11 FCC Rcd 14689, 14693 ¶ 13 (1996); *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974).

<sup>17</sup> *WorldCom, Inc. and Its Subsidiaries, Transferor, and MCI, Inc., Transferee, Applications for Consent to Transfer and/or Assign Section 214 Authorizations, Section 310 Licenses, and Submarine Cable Landing Licenses*, 18 FCC Rcd 26484, 26503 ¶ 29 (2003).

<sup>18</sup> *Adelphia Bankruptcy Order* at n. 9; *see also Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5344-45, ¶¶ 15-19, *recon. denied*, 8 FCC Rcd. 8744 (1993).

<sup>19</sup> *Id.*

claim that the Parties have not shown that the proposed Transactions will produce public interest benefits. But the bankruptcy proceedings represent the authoritative determination of the U.S. government that the proposed Transactions represent the preferred means of achieving the “core policies” of the bankruptcy laws. And established Commission precedent recognizes that the agency will approve such transactions so long as they will not “unduly interfere” with the agency’s other responsibilities under the Communications Act.<sup>20</sup>

In this case, of course, the Parties have demonstrated that the proposed Transactions – precisely because they facilitate and accelerate Adelphia’s emergence from bankruptcy – produce tangible public interest benefits, including, among other things, the repayment of innocent creditors, the accelerated deployment of advanced services to consumers in Adelphia service areas, more effective and efficient delivery of services through improved geographic rationalization of systems, and the unwinding of Comcast’s passive interests in Time Warner Cable and Time Warner Entertainment.<sup>21</sup> These facts are inconsistent with DIRECTV’s position, so DIRECTV attempts to deal with them by manufacturing a different story that is more compatible with its objectives to impede the Transactions.<sup>22</sup> But this tactic cannot work because it is so plainly at odds with the Commission’s consistent view that facilitating the emergence of a Commission

---

<sup>20</sup> *LaRose v. FCC*, 494 F.2d 1145, 1148 (D.C. Cir. 1974).

<sup>21</sup> Reply at 5-23.

<sup>22</sup> DIRECTV argues that its position does not “undercut the bankruptcy process” because it only asks the Commission to impose conditions on, and not to deny, the proposed Transactions. Surreply at 25. This is disingenuous; in the very same sentence in which it makes this claim, DIRECTV *does* continue to suggest circumstances under which the Commission should reject the Transactions. More fundamentally, DIRECTV is here again trying to obfuscate the point. The issue is not whether DIRECTV is arguing for conditions on or rejection of the Transactions. It is whether the significant and demonstrable benefits of Adelphia’s emergence from bankruptcy, which all agree are facilitated by the proposed Transactions, must be considered by the Commission as public interest benefits weighing in favor of approval of the Transactions.



licensee from bankruptcy *is*, in itself, a public interest benefit that is properly a part of its transaction analysis.

In addition, the Parties have not only shown that Adelphia's emergence from bankruptcy is a public interest benefit of the proposed Transactions, but they have demonstrated that it is a strong and quantifiable one. For example, the Parties have shown that the proposed Transactions will promote the "efficient and economical administration of [bankruptcy] cases."<sup>23</sup> They have also shown that the proposed Transactions are the most efficient way to repay innocent creditors. That was the judgment not only of Adelphia's Board of Directors, who have a fiduciary duty to maximize creditor value, but also of the bankruptcy court, the entity with the authority and expertise to make such judgments.<sup>24</sup>

Finally, and perhaps most important from the Commission's perspective, Applicants have shown that, because Adelphia has been mired in bankruptcy for more than three years, it has lagged behind Comcast and Time Warner in the deployment of advanced services such as voice communications, high speed data services, HDTV, digital cable and DVRs. To give just one example here, Comcast and Time Warner are aggressively rolling out new voice communications services to consumers in their markets,<sup>25</sup> but Adelphia, because of the constraints of its bankruptcy status, has made a business decision not to deploy such voice services.<sup>26</sup> It is clearly undesirable for

---

<sup>23</sup> See Reply at 19-23 (citing *WorldCom/MCI Order* at ¶ 29).

<sup>24</sup> *Id.* at 20-21.

<sup>25</sup> Public Interest Statement at 46.

<sup>26</sup> See Ex Parte Letters from Michael H. Hammer, Counsel for Adelphia Communications Corp., to Marlene H. Dortch, Secretary, FCC (Oct. 13, 2005) (describing ex parte meetings with Commissioner Adelstein and Commissioner Copps and stating that Adelphia, "because of its need to focus on its emergence from bankruptcy, has decided not to deploy VoIP."). See also "Stripping Adelphia Down to the Bare Wire: Bankruptcy, impending sale force company to scrap plan for Internet phone service," Rocky Mountain News (Oct. 19, 2005).

Adelphia customers to continue to be deprived of this and other important services where, as here, the buyers stand ready to rapidly expand and improve the provision of advanced services for consumers in these markets, just as they have done in other markets where they have acquired systems.<sup>27</sup>

**B. Contrary to DIRECTV's Claims, The Commission Has Recognized the Demonstrated Public Interest Benefits of Clustering**

DIRECTV's Surreply attacks the Parties' demonstration of the public interest benefits that will be generated by the Transactions, focusing in particular on the public interest benefits that the Parties have identified as flowing from the geographic rationalization, or "clustering," of systems.<sup>28</sup> Specifically, DIRECTV alleges that the Parties' demonstration of the pro-competitive benefits of clustering was merely "a summary of what the *cable industry* has asserted over the years."<sup>29</sup> DIRECTV's allegation is patently false. Indeed, the Parties explicitly relied on findings made by the Commission and the Government Accountability Office ("GAO"). For example:

- In footnote 48 of the Reply, the Parties quoted directly from the Commission's *Fifth Annual Video Competition Report*, which states that "[b]y clustering cable systems, cable operators may be able to achieve efficiencies that facilitate the provision of cable and other services, such as telephony."<sup>30</sup> The Commission does not cite a cable operator's comments when it makes this statement. Indeed, the paragraph begins with the words "We also find," making clear that what follows is the Commission's conclusion, not merely a restatement of the cable industry's arguments.

---

<sup>27</sup> Reply at 8-9.

<sup>28</sup> In addition to the public interest benefits attributable to the geographic rationalization of the Parties' regional footprints, the Applications demonstrated that the Transactions will produce three other categories of public interest benefits: the acceleration of advanced services deployment in the Adelphia systems; the "unwinding" of Comcast's passive interest in Time Warner Cable and Time Warner Entertainment; and the compensation of Adelphia's stakeholders in furtherance of the policies embodied in the bankruptcy laws. Reply at 5-9, 19-24. DIRECTV has neither addressed nor challenged the first two of these additional public interest benefits.

<sup>29</sup> Surreply at 20 (emphasis in original).

<sup>30</sup> *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284, 24291-92 ¶ 13 (1998).

- Paragraph 144 of the *Fifth Annual Report*, cited in footnote 48 of the Reply, includes a Commission finding that clustering can result in pro-competitive effects because it “provides a means of improving efficiency, reducing costs, and attracting more advertising. Clustering also better positions cable as a potential competitor for local exchange services.”<sup>31</sup> There is no indication in this discussion that the conclusion is merely a summary of the cable industry’s position.
- In paragraph 162 of the Commission’s *Sixth Annual Report*, cited in footnote 49 of the Reply, the Commission makes no mention of any commenter’s contentions or opinions, and indeed only cites a GAO report that, according to the Commission, “also found that ownership ties and clustering strategies may provide cost savings and possible competitive advantages.”<sup>32</sup>

Just this year, the Commission stated that “[c]lustering creates efficiencies through scale and scope, and allows cable operators to serve geographically contiguous areas. This, in turn, may make provision of advanced services, creation of regional programming, and competition in the regional advertising market more economical.”<sup>33</sup>

DIRECTV’s assertion that “the Commission’s only real economic analysis of [the benefits of clustering] to date found only higher consumer prices and no improvement in services”<sup>34</sup> is also incorrect, as explained in the Parties’ Reply. The report cited by DIRECTV, now five years old, actually explained that, because clustered operators offer more channels, monthly cable rates for clustered systems are similar to non-clustered systems on a per-channel basis.<sup>35</sup> Furthermore, the report included a detailed cautionary

---

<sup>31</sup> *Id.* at 24371 ¶ 144.

<sup>32</sup> *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd 978, 1051 ¶ 162 (1999).

<sup>33</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2826-27 ¶ 132 (2005) (“Eleventh Annual Competition Report”). Moreover, as Chairman Martin recently acknowledged: “[w]e are seeing both intermodal and intramodal providers aggressively competing for customers using a multitude of new technologies and platforms.” Statement of Chairman Kevin J. Martin, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control & Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Dockets No. 05-65 & 05-75 (Oct. 31, 2005). Through geographic rationalization, Time Warner and Comcast will continue to facilitate the development of intermodal competition in the provision of high speed Internet and telephony services.

<sup>34</sup> Surreply at 20-21.

<sup>35</sup> Reply at 13.

statement wherein the Commission explained that the finding of a positive relationship between clustering and monthly rates “may be due to a variety of reasons.”<sup>36</sup>

**C. There is No Support for DIRECTV’s Position that the Commission Should Ignore the Benefits That Will Result from Comcast and Time Warner’s Ownership of the Adelphia Systems**

DIRECTV claims that, “[i]f indeed other cable operators have achieved system performance and service levels comparable to Comcast and Time Warner, it follows that the Transactions are not the only way to provide Adelphia subscribers with this level of service.”<sup>37</sup> However, whether other cable operators could improve service or offer new services is simply irrelevant; those unnamed parties are not before the Commission and are not properly a part of the analysis of these Transactions.<sup>38</sup> Indeed, as pointed out in the Parties’ Reply, Section 310(d) of the Act flatly forbids the agency from even considering whether the public interest might be better served by transfer of the license to “a person other than the proposed transferee(s).”<sup>39</sup>

---

<sup>36</sup> *Id.* (quoting *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, 16 FCC Rcd 4346, 4361 (2001)).

<sup>37</sup> Surreply at 26-27.

<sup>38</sup> The Commission does not “look[] beyond the proposed buyer” in determining whether the public interest would be served by a grant of the subject application.” *McAlister Television Enterprises, Inc.*, 60 R.R. 2d 1379, 1385 (1986). Instead, its public interest findings are “based solely on consideration of the qualification” of the applicants, not of other potential buyers who are not before the Commission. *Dorothy J. Owens, Debtor-in-Possession*, 5 FCC Rcd 6615, 6620 (1990). *See also Applications of Brawley Broadcasting Co. and KAMP, Inc.*, 13 FCC Rcd 21119, 21122 (1998) (concluding that the Commission is barred by statute from considering a buyer other than the one proposed).

<sup>39</sup> Reply at 7; 47 C.F.R. § 310(d). DIRECTV’s reliance upon a broadcast rulemaking wherein the Commission determined that Section 310(d) would not be violated by implementation of a broadcast ownership rule is inapposite. *See* Surreply, n. 81. In that rulemaking, the Commission determined a broadcast licensee proposing a transaction that would violate the Commission’s ownership rules must demonstrate that an eligible buyer is not available. Specifically, the Commission found that it was not reviewing potential buyers in violation of Section 310(d), but merely setting the bar for a waiver request from a licensee who proposes to assign or transfer control of its license to a buyer that would result in a violation the Commission’s ownership rules. *See Review of the Commission’s Regulations Governing Television Broadcasting*, Mem. Op. & Second Order on Recon., 16 FCC Rcd 1067, 1076-77 (2001). Similarly, DIRECTV’s reliance on the Department of Justice Merger Guidelines is misplaced. Although the Commission may and has used the Merger Guidelines as guidance in reviewing transactions, the Guidelines obviously cannot override the requirements of the Commission’s own enabling statute.

Even if DIRECTV's argument were relevant, it rests on the incorrect assumption that cable operators are fungible for the purpose of improving service to Adelphia's subscribers and offering new and advanced services. As demonstrated in the Public Interest Statement and Reply, Time Warner and Comcast are each unique in terms of their capabilities, proven track records, and, perhaps most important, the close proximity of their cable systems to the Adelphia systems being acquired. No other firms have the combination of capabilities, geographic correlation to Adelphia's systems, and proven track record of the Applicants to maximize these benefits. Moreover, no other potential operators of these systems can offer the efficiencies that the Applicants, based on the location of their current cable systems, are uniquely able to bring to the Adelphia properties through regionalized management and operation.<sup>40</sup> Incorporating the Adelphia systems into existing regional operations will allow the Applicants to more efficiently deploy new services,<sup>41</sup> and to mount more effective marketing campaigns and promotional efforts aimed at attracting and retaining customers for those services.<sup>42</sup> Improved regionalization also will facilitate coordination and centralization of facilities that will result in better and more efficient service for customers.<sup>43</sup>

Finally, because these benefits of improved regionalization will occur in a competitive environment, the benefits will be dynamic, not static. That is, the improved regionalization of Time Warner and Comcast will improve their competitive posture as compared to DBS providers and regional ILECs, which will yield ongoing benefits to

---

<sup>40</sup> Public Interest Statement at 68.

<sup>41</sup> *See id.* at 57-58.

<sup>42</sup> *See id.* at 58-59.

<sup>43</sup> *See id.* at 59-60. The Applicants previously stated that they expect to provide customer service and technical assistance in-house from offices located closer to the communities of the acquired systems. *Id.*

consumers, not merely one-time cost-reductions.<sup>44</sup> While both new and existing customers served by Time Warner Cable and Comcast will receive additional service choices delivered more effectively, the benefits will be especially significant for former Adelphia customers, who have been served by a company operating for sale, with comparatively less investment, less spending, a smaller work force and that is more reliant on contractors for key services.

### **III. DIRECTV'S SPECULATIVE ASSERTIONS DO NOT DEMONSTRATE THAT TRANSACTION-RELATED HARMS WILL OCCUR IN ANY RSN MARKETS**

In its attempt to show that the proposed Transactions will cause competitive harm, DIRECTV ignores an important aspect of the Commission's review standard. As the agency has stated in the context of numerous transactions (including the *News Corp./Hughes/DIRECTV* transaction<sup>45</sup>) and reiterated just this month in another transaction proceeding,<sup>46</sup>

[d]espite the Commission's broad authority, we have held that we will impose conditions only to remedy harms that arise from the transaction (i.e., transaction-specific harms) and that are fairly related to the Commission's responsibilities under the Communications Act and related statutes. Thus, we do not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.<sup>47</sup>

---

<sup>44</sup> See *id.* at 50-56. See also Joseph Farrell, *Creating Local Competition*, 49 Fed. Comm. L.J. 201, 202 (1996) ("Not only do individual firms challenged by competition find ways to cut prices and improve their products and their customer service, but consumers also get a choice, so even if (to pick on the local incumbent only because it's the local incumbent) Bell Atlantic for some reason doesn't respond and improve its offerings, Washingtonians may be able to choose Ameritech's service, or Sprint's, or TCI's, or Microsoft's. Better firms grow, which produces even higher powered incentives to be better, and gives the average consumer more than the firm-by-firm average improvement.")

<sup>45</sup> *General Motors Corporation and Hughes Electronics Corporation*, Memorandum Opinion and Order, 19 FCC 473 (2003) ¶ 152 ("*News Corp./Hughes/DIRECTV Order*").

<sup>46</sup> *Rainbow DBS Company LLC, Assignor, and EchoStar Satellite L.L.C., Assignee, Consolidated Application for Consent to Assignment of Space Station and Earth Station Licenses, and related Special Temporary Authorization*, Memorandum Opinion and Order, IB Docket No. 05-72, FCC 05-177 (Oct. 12, 2005) ¶ 13.

<sup>47</sup> *Id.* See also *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, WT Docket No. 05-63,

As shown below, virtually all of DIRECTV's allegations may be dismissed on this basis alone. As we will also show, there are numerous other factual, legal and economic reasons for the Commission to dismiss DIRECTV's claims.

DIRECTV focuses much of the Surreply on alleged harms relating to regional sports networks ("RSNs"). As noted above, the Commission's review takes cognizance only of harms that may result from the proposed Transactions. DIRECTV fails to demonstrate that the claimed harms it asserts will arise from the proposed Transactions. As shown in the Parties' Public Interest Statement and Reply, these Transactions result in minimal changes relevant to Comcast's and Time Warner's interests in RSNs. For example:

- Neither Comcast nor Time Warner is acquiring *any* new interest in *any* RSN through these Transactions.
- As DIRECTV has conceded, there can be no transaction-specific effect in RSN service areas where there is no (or a *de minimis*) change in subscribers.<sup>48</sup> Thus, in the footprints covered by certain Comcast-owned RSNs – for example, Comcast SportsNet Chicago ("CSN-Chicago") and Comcast SportsNet West ("CSN-West") – the Transactions can have no effect whatsoever.

Given these facts and findings, DIRECTV can only advance theoretical and speculative arguments that the proposed Transactions may: (1) adversely affect competition in certain RSN service areas, and/or (2) lead to the wholesale migration of regional sports programming to terrestrial delivery (that DIRECTV has long insisted

---

FCC 05-148 (2005) ¶ 23; *Applications of Western Wireless Corporation and Alltel Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, WT Docket No. 05-50, FCC 05-138 (2005) ¶ 21; *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21545 ¶ 43 (2004).

<sup>48</sup> See DIRECTV Comments at 44 (seeking conditions only in markets where concentration would increase).

would occur).<sup>49</sup> However, if DIRECTV believes that the Transactions will adversely affect RSN competition, it must identify with particularity the geographic areas and the manner in which it believes *competition will be adversely affected*. A general assertion that increased concentration *may* lead to greater incentives for a cable operator to form an RSN and *may* direct its operations in an anticompetitive manner does not satisfy the transaction-specific showing of competitive harm required by the Commission.<sup>50</sup> As the Commission has stated, “[a]n application for a transfer of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry. Those issues are best left to broader industry-wide proceedings.”<sup>51</sup> That is the case here. Accordingly, DIRECTV’s generalized accusations are the type that the agency has consistently concluded should be addressed, if at all, in a rulemaking of general applicability.

---

<sup>49</sup> The econometric analysis submitted by Lexecon as Appendix A to the Surreply, which purports to consider the effect of “cable-only” exclusives on DBS penetration, is entirely premised on such “terrestrial migration” because the program access rules ordinarily prohibit exclusivity for vertically integrated, satellite-delivered RSNs. In this regard, DIRECTV’s argument that the Commission should view the unique Philadelphia case as indicative of a broader “trend” toward the terrestrial migration of RSNs is simply without merit. As discussed at length in numerous proceedings before the Commission and the courts (most recently in the Parties’ Reply), Comcast’s decision to deliver Comcast SportsNet Philadelphia (“CSN Philadelphia”) terrestrially was driven not by regulatory factors but a confluence of business reasons. The Commission recognized these were “legitimate business reasons.” *DIRECTV, Inc., v. Comcast Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 22802, 22808 ¶ 14 (2002). The Parties devoted more than ten pages to explaining the history of CSN Philadelphia in their Reply *precisely* because DIRECTV continues to mischaracterize the Philadelphia case as a “circumvention” of the program access rules, Surreply at 17, when in fact the Commission and courts explicitly found that Comcast’s decision did not indicate an intent to evade the program access rules, but was a “competitive choice” that “Congress deemed legitimate” that was made for “valid business reason[s].” See Reply at 46-47 and cases cited therein. DIRECTV attempts to inject something new into its discussion of CSN Philadelphia by suggesting that Comcast could withhold this RSN from potential new entrants in the future. However, this claim also rings hollow, since, as DIRECTV itself acknowledges, CSN Philadelphia has consistently been made available to all terrestrial MVPDs. Surreply at n. 29. Therefore, absolutely no evidence exists of a “trend” by Comcast despite DIRECTV’s relentless (and consistently incorrect) repetition of its claims (which remain at best conjectural).

<sup>50</sup> Cf. *Applications for Consent to Transfer Control of Licenses from Comcast Corporation and AT&T Corp. to AT&T Comcast Corporation*, 17 FCC Rcd 23246, 23295 ¶ 127 (2002) (“AT&T/Comcast Order”) (rejecting theory of competitive harm as speculative and non-merger specific); *Shareholders of Hispanic Broadcasting Corporation and Univision Communications, Inc.*, 18 FCC Rcd 18834, 18844, 18848, 18854 ¶¶ 25, 36 n.74, 54 n.107 (2003) (same).

<sup>51</sup> *News Corp./Hughes/DIRECTV Order* at ¶ 131.



**A. DIRECTV's Arguments Are Based on Flawed Theoretical Premises and Assumptions**

Relying upon the anonymous “Lexecon” report, DIRECTV advances an entirely theoretical and speculative argument that the Transactions may adversely affect competition in certain unidentified “RSN markets”<sup>52</sup> other than the five RSN service territories analyzed in the Parties’ Reply. The Commission should reject this baseless contention. At the outset, DIRECTV is fundamentally mistaken in arguing that, as a result of the Transactions, Comcast or Time Warner will be in a better position to enter into exclusive agreements. DIRECTV’s argument appears to be based on the implicit premise that exclusive agreements must cover an RSN’s entire footprint — so that, when a cable operator’s footprint comprises only part of the RSN’s footprint, part of the premium that the cable operator pays to the RSN goes to waste.<sup>53</sup> DIRECTV’s premise is incorrect.

DIRECTV implies that, when a cable operator’s local service area grows to encompass a greater part of the RSN’s footprint, less exclusivity premium is wasted—thereby, all else being equal, making exclusive agreements more likely to occur. Thus, its entire argument is founded on the baseless assumption that exclusive arrangements

---

<sup>52</sup> The Surreply simply makes no effort to identify any particular RSN markets where the Transactions could result in the competitive harms alleged by DIRECTV. DIRECTV’s sole concession to this requirement to date has been the submission of calculations showing the effect of the Transactions on the Herfindahl-Hirschman Index (“HHI”) in various RSN footprints. DIRECTV Comments at Exhibit A (Bamberger/ Neumann Statement). In their Reply, the Parties demonstrated that these HHI calculations, which are normally used to analyze the effect of horizontal mergers between competitors, are “not a useful tool” for evaluating the vertical foreclosure concerns raised by DIRECTV (and evaluated by the Commission in the News Corp./ Hughes/ DIRECTV transaction). Indeed, as noted in the Reply, DIRECTV’s own economists failed to draw any conclusions regarding the impact – or even relevance – of their HHI calculations to the concerns raised by DIRECTV. Reply at 56-57.

<sup>53</sup> See Comments of DIRECTV, Inc. in MM Docket No. 92-264 (Aug. 8, 2005) at 5 (“where the cable operator controls a large share of the viewers, the ‘cost’ of withholding programming from rivals may be outweighed by whatever premium the cable operator is willing to pay for the exclusivity”); DIRECTV Comments at 12 (“[A]s a cable operator controls more MVPD subscribers in a given geographic area, an RSN operating in that area gains more from distribution on the cable system and *loses less* if it denies distribution to the cable operator’s rivals.”).

between a cable operator and an RSN must or do always cover the entirety of the RSN's footprint (thereby giving rise to premium waste in cases where the cable operator's footprint is only a subset of the RSN's footprint).<sup>54</sup> In fact, however, a cable operator that wishes to seek exclusivity generally has no incentive to buy exclusivity that benefits neighboring cable operators—the cable operator has an incentive only to seek to obtain the benefit inside the cable operator's own franchise area. Indeed, cable operators whose service area constitutes only part of an RSN's footprint can and do buy exclusivity only insofar as their own services areas are concerned.<sup>55</sup> This leaves the RSN free to license DBS operators to sell to customers in the rest of the RSN's footprint. DBS operators can and do limit their sales to a subset of an RSN's footprint.

To illustrate, if the exclusivity premium for an RSN's entire footprint would be, say, \$100, a cable operator with only a quarter of that footprint would be willing to pay only \$25, and a cable operator with half the RSN's footprint would be willing to pay only \$50. DIRECTV has never pointed to any reason to believe that, on a per-subscriber basis, the premium for exclusivity decreases as a cable operator's cluster size increases.<sup>56</sup> And, absent such a showing, there is no reason to believe that, as a cable operator's local service area grows, the incidence of exclusive agreements will increase. Put differently,

---

<sup>54</sup> See, e.g., Surreply, Lexecon Report at 7 (“If a single cable firm negotiates a ‘cable only’ exclusive with the RSN, the DBS operators would be expected to lose subscribers to every cable firm operating in the RSN footprint. Any one cable firm would capture only a small share of the total benefit from subscriber switching enjoyed by all cable operators in the region, but would bear the entire cost of the strategy (e.g., compensating the RSN for lost sales to DBS operators.”).

<sup>55</sup> As an empirical matter, for example, Time Warner has entered into exclusive RSN programming agreements limited to its own territory. It does not share the benefits of exclusivity with other MSOs, so increasing the size of its territory should have no effect on Time Warner's incentives to enter into exclusive agreements.

<sup>56</sup> See Reply, Ordoover Declaration ¶ 39 (“Despite the fact that DIRECTV alleges that the transactions will provide the incentive and ability of Comcast (and Time Warner) to enter into exclusive arrangements with unaffiliated RSNs, DIRECTV's economists—Dr. Bamberger and Dr. Neumann—do not present any analysis of this theory.”)

to the extent the Transactions increase cable footprints, they do not make DBS operators worse off — they will leave them in precisely the same position in which they are now.

DIRECTV also argues that, as an MSO gains a greater share of systems in an affiliated RSN's footprint, this necessarily increases the profitability of withholding RSN programming from satellite companies. In advancing this argument, DIRECTV relies upon an entirely theoretical model developed by Lexecon that is not based on any empirical data. The fundamental premise of DIRECTV's argument is that an MSO with ownership of, or exclusive rights to, RSN programming must bear all the costs of withholding (*i.e.*, lost RSN affiliate fees or the cost of the exclusive), but cannot capture all of the benefits of withholding (*i.e.*, subscribers who switch from satellite because of the withholding) if other MSOs serve some areas within the RSN footprint. This is so because the MSO "paying" for exclusivity will only gain a portion of those subscribers switching from satellite—because some subscribers within the footprint will switch to other MSOs. These other MSOs will obtain a portion of the benefits of foreclosure without bearing any of the cost. As the foreclosing MSO's share of the RSN footprint grows, DIRECTV argues, that MSO would be able to "capture" a greater number of subscribers switching from satellite and thus be better able to profit from vertical foreclosure.

There are serious problems with this argument. DIRECTV is incorrect in assuming that an MSO engaging in foreclosure must bear all of the costs of foreclosure but must "share" the benefits with other MSOs. If a vertically integrated MSO withholds RSN programming from satellite but sells it to other MSOs,<sup>57</sup> then the price paid by the

---

<sup>57</sup> Of course, this would not be permissible for satellite delivered programming under the program access rules.

other MSOs for the programming should already reflect any benefits the other MSOs receive from satellite exclusivity. Acquiring one or more of these other MSOs should have no effect on the vertically integrated MSO's incentives to engage in foreclosure.

**B. DIRECTV Fails to Identify Additional RSN Service Areas Affected by the Transactions**

If DIRECTV believes that the Transactions will adversely affect competition in any geographic areas, it must identify them with particularity and make a factual showing. DIRECTV cannot simply rely upon speculation and conjecture to challenge the proposed Transactions.<sup>58</sup> Instead of offering RSN-specific evidence, however, DIRECTV simply posits two hypothetical scenarios. First, DIRECTV speculates that Comcast or Time Warner might be in a better position to enter into exclusive agreements with unaffiliated RSNs in certain markets as a result of the Transactions.<sup>59</sup> Second, DIRECTV theorizes that Comcast and Time Warner (1) *may* create new affiliated RSNs; (2) “entice sports teams” to execute rights agreements with the new RSNs;<sup>60</sup> and (3) engage in anticompetitive conduct with respect to the distribution of these new RSNs. Of course, DIRECTV fails to identify any geographic region in which such conduct is likely to occur. Such a theoretical approach would be unacceptable for any commenter, but it is particularly disingenuous for DIRECTV – because its parent company, News Corp.,

---

<sup>58</sup> As recently noted by Commissioner Abernathy in her statement supporting the approval of the mergers of SBC/AT&T and Verizon/MCI: “It should not be standard operating procedure to craft company-specific merger conditions to address unknown and hypothetical competitive threats. After all, the customary administrative weaponry in the Commission’s arsenal – rulemaking, enforcement, and so on – does not suddenly evaporate once a merger is approved.” Statement of Commissioner Kathleen Q. Abernathy, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control & Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Dockets No. 05-65 & 05-75 (Oct. 31, 2005).

<sup>59</sup> Surreply at 9.

<sup>60</sup> *Id.* at 7.

operates the RSNs in most of the nation's significant regions.<sup>61</sup> News Corp./DIRECTV obviously possesses ample information about the many regions affected by the Transactions, yet – for apparently tactical reasons – chooses to withhold this evidence from the Commission.

Contrary to DIRECTV's contention, there is little or no risk that Comcast or Time Warner will negotiate exclusive RSN deals in any of the areas in which News Corp. controls the incumbent RSN. The *News Corp./Hughes/DIRECTV Order* prohibits News Corp. from entering into exclusive arrangements for its RSNs with any MVPD, including Comcast and Time Warner.<sup>62</sup> Even without the prohibition, News Corp.'s ownership of the incumbent RSNs makes exclusive deals highly unlikely for a simple and quite compelling reason: DIRECTV is a direct and vigorous competitor of Comcast and Time Warner. Therefore, News Corp., DIRECTV's controlling parent, would have a strong incentive – and clear ability – *not* to enter into exclusive arrangements for its RSNs with either Comcast or Time Warner.

Moreover, there is no support for the speculative claim that Comcast or Time Warner will, as a result of the Transactions, be able to create new RSNs and then “lure away” the relevant sports teams. As discussed in more detail below, News Corp. has succeeded in building and maintaining its leading position as a supplier of RSN programming in many regions in which Comcast has a significant share of MVPD subscribers, even though News Corp. had *no* MVPD subscribers at the time it obtained

---

<sup>61</sup> In Los Angeles, News Corp. owns 100 percent of Fox Sports Net West and Fox Sports Net West 2; in Atlanta, News Corp. owns 88 percent of Fox Sports Net South; in Minneapolis-St. Paul, News Corp. owns 100 percent of Fox Sports Net North; in Miami-Ft. Lauderdale, News Corp. owns 94 percent of Sun Sports Network and 100 percent of Fox Sports Net Florida; and in Pittsburgh, News Corp. owns 100 percent of Fox Sports Net Pittsburgh.

<sup>62</sup> *News Corp./ Hughes/ DIRECTV Order* at Appendix F.

the programming rights. DIRECTV has provided no evidence to suggest that the Transactions will fundamentally alter News Corp.'s leading position in the RSN marketplace or make News Corp. unable to continue to compete for sports rights.

Indeed, in most RSN territories in which Comcast or Time Warner are acquiring subscribers as a result of these Transactions, News Corp. has long-term contracts either with all of the local teams or with a sufficient number such that it would be difficult or impossible for Comcast, Time Warner, or a third party to launch a new RSN and "lure" the teams away from an incumbent RSN any time soon.<sup>63</sup> A few examples of News Corp. RSNs' agreements are as follows:<sup>64</sup>

- Los Angeles: In Los Angeles, News Corp. owns Fox Sports Net West. The Applicants understand that this RSN has contracts with the Angels through 2008, the Kings through 2010 or 2012, and the Lakers through 2013. News Corp. also owns Fox Sports Net West 2. The Applicants understand that this RSN has contracts with the Clippers through 2007 or 2008, the Mighty Ducks through 2008, and the Dodgers through 2010. Given the duration of the existing sports rights agreements, it would be highly unlikely that an alternative RSN could be formed prior to 2010 at the earliest. Certainly, News Corp. has rights to the most popular sports teams in the region (the Dodgers, Lakers, and Angels) through 2010 or later.
- Minneapolis-St. Paul: In Minneapolis-St. Paul, News Corp. owns Fox Sports Net North. The Applicants understand that this RSN has a contract with the Twins through 2012 and contracts with the Minnesota Wild and Timberwolves through an undetermined date. Without access to the Twins, it appears highly unlikely that a competitive RSN could be formed prior to 2012.
- Miami: In Miami-Ft. Lauderdale, News Corp. owns Sun Sports Network. The Applicants understand that this RSN has a contact with the Heat through 2012. News Corp. also owns Fox Sports Net Florida, which has contracts with the Tampa Bay Devil Rays through 2009 and the Florida Marlins through 2010.

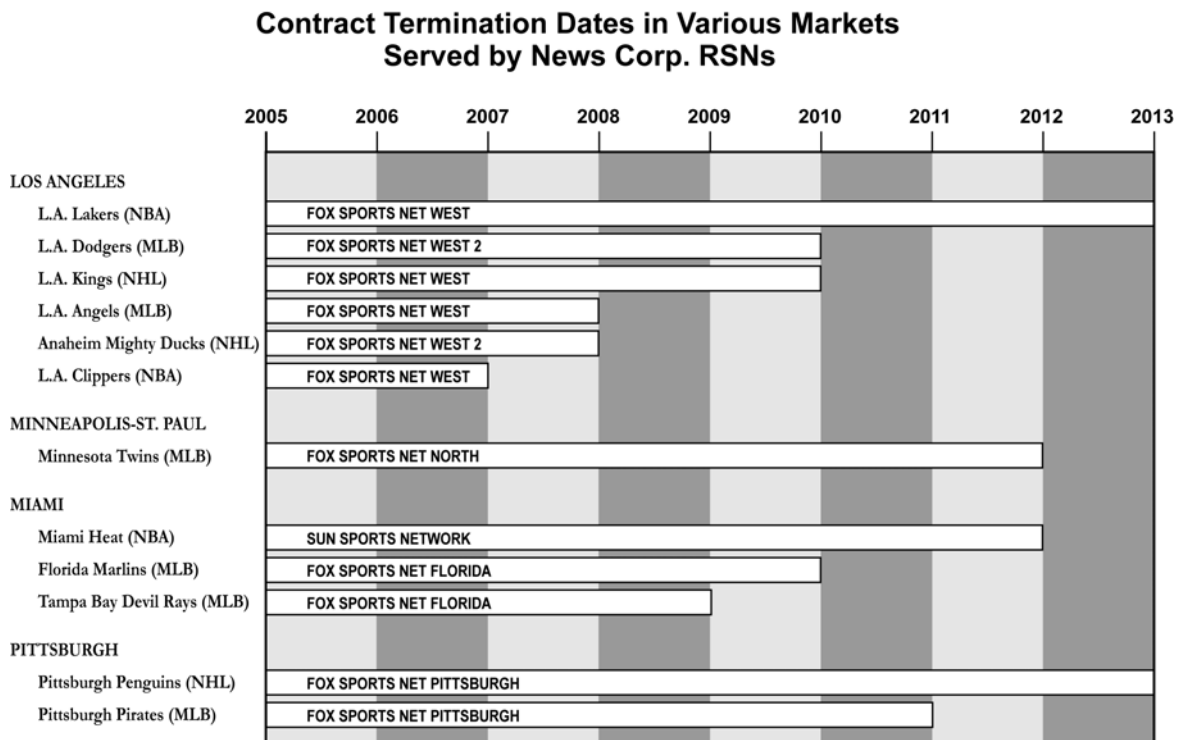
---

<sup>63</sup> It is also likely that News Corp. also has the protection in many, if not all, of its rights agreements with sports teams of customary "back end" provisions at their conclusion, such as exclusive negotiating periods, "rights of first refusal" and "rights to match" any third party offer.

<sup>64</sup> This information regarding the duration of News Corp.'s sports rights contracts has been gathered from various sources and the parties believe that this information is generally accurate. Because we do not have access to the actual News Corp. contracts, however, it is possible that those contracts may contain terms that diverge from those described herein. Moreover, the time frames could be even longer if News Corp. has rights of first refusal or automatic renewal rights.

Comcast and Time Warner have not been able to determine the expiration date of the Florida Panthers contract. However, given the expiration dates of the other three contracts, it is unlikely that a new RSN could be formed prior to 2010 at the earliest.

- Pittsburgh: In Pittsburgh, News Corp. owns Fox Sports Net Pittsburgh. The Applicants understand that this RSN has contracts with the Penguins through 2013 and the Pirates through 2011. Accordingly, it appears highly unlikely that any new competing RSN could be formed prior to 2011 at the earliest.



In sum, DIRECTV has failed to demonstrate that there is any reason for the Commission to assume that the Transactions could cause harms in RSN territories where the Applicants do not operate RSNs, nor has it pointed to any specific additional geographic areas in which the Transactions would create a competitively adverse effect. At most, the Commission should evaluate the competitive effects of the Transactions in regions where: (1) an Applicant is increasing its share by greater than a *de minimis* amount and (2) that same Applicant owns the local RSN. As explained below, even in those few

service areas where these conditions are met, there is no basis to conclude that the Transactions will cause public interest harms.

**C. DIRECTV's "Empirical" Evidence Is Flawed, Misleading, and Incomplete**

DIRECTV attempts, unsuccessfully, to buttress its speculative claims regarding the effects of clustering by raising various allegations concerning the pricing practices of CSN Chicago, CSN West, and SportsNet New York.<sup>65</sup> As demonstrated below, however, these claims are inaccurate and do not support DIRECTV's theories about clustering.

**CSN Chicago.** DIRECTV's claim that increased concentration in the Chicago DMA enabled Comcast to "raise RSN prices dramatically in Chicago"<sup>66</sup> is demonstrably false. In its first year of operations, CSN Chicago is charging all MVPDs prices that (subject to a standard annual increase) are substantially identical to the prices charged to Comcast and other cable operators by Fox Sports Net Chicago ("FSN Chicago") for the last year of its carriage.<sup>67</sup> The sum and substance of DIRECTV's complaint here is that it should not now have to pay the same price that every other MVPD pays for CSN Chicago, but rather a highly advantageous price similar to one it enjoyed under its carriage agreement for FSN Chicago. In particular, the Applicants understand that DIRECTV had an agreement with Rainbow Media, the parent of FSN Chicago, which governed DIRECTV's carriage of all Rainbow-affiliated sports networks nationwide.<sup>68</sup> This contract was entered into when DIRECTV was significantly smaller than it is today. The contract provided for a flat payment for all of the Rainbow RSNs that applied irrespective of, for example: (1) the RSNs' locations; (2) the delineated territories within

---

<sup>65</sup> Surreply at 8-9.

<sup>66</sup> *Id.* at 14.

<sup>67</sup> Declaration of Allan Singer (attached as Exhibit B) at ¶ 4 ("Singer Declaration").

<sup>68</sup> *Id.* ¶ 5.



a specific Rainbow RSN; (3) the number of DIRECTV subscribers to a particular RSN service; or (4) the total number of DIRECTV subscribers that receive all of the Rainbow RSNs nationwide. As DIRECTV grew over time, its “per subscriber net effective rate” significantly decreased, although its monthly payment remained constant (if calculated for each individual Rainbow RSN). Accordingly, when viewed on a per-subscriber basis, the price that DIRECTV paid for FSN Chicago was substantially below the price then being paid by Comcast and other MVPDs.<sup>69</sup>

When CSN Chicago was formed, its per-subscriber price was, as noted, essentially the same as the price that all MVPDs other than DIRECTV (and EchoStar, which the Applicants understand had a similar deal with Rainbow Media) had been paying for FSN Chicago.<sup>70</sup> DIRECTV, having lost the benefit of its nationwide deal with Rainbow, now pays the standard CSN Chicago prices that every other MVPD pays. Thus, when seen in this light, it is clear that DIRECTV’s claim that Comcast “raise[d] RSN prices dramatically in Chicago” is simply incorrect.<sup>71</sup>

**CSN West.** DIRECTV also raises a number of allegations regarding the creation and pricing of CSN West<sup>72</sup> that it claims supports its position that increased regional clustering will lead to harm in the RSN marketplace. However, as explained below, DIRECTV’s allegations regarding CSN West are highly misleading.

---

<sup>69</sup> *Id.*

<sup>70</sup> In fact, the CSN Chicago rate card is arguably better than the FSN Chicago rate card because CSN Chicago offers high-definition programming at no additional charge to its distributors, unlike the News Corp. or Rainbow-owned RSNs. *Id.* ¶ 4.

<sup>71</sup> DIRECTV is aware of this, as it discussed its prior rate structure in detail with CSN Chicago when negotiating for coverage. Even so, DIRECTV’s allegations regarding CSN Chicago are surprising given that the price for CSN Chicago (as averaged across the three zones of the RSN footprint) is likely comparable to, or less than, the single price that DIRECTV received from FSN Chicago. Upon information and belief, Comcast also believes that DIRECTV likely received a reduction in its annual payments under the nationwide Rainbow agreement when CSN Chicago, rather than FSN Chicago, began carrying the games of the Chicago sports teams.

<sup>72</sup> Surreply at 14, 17.

First, DIRECTV implies that increased clustering allowed Comcast to “wrest control over”<sup>73</sup> the rights to the Sacramento Kings’ games from Fox Sports Network Bay Area (“FSN Bay Area”). In fact, Comcast acquired the rights only after the Kings were unable to reach an agreement with FSN Bay Area over the terms of carriage. By the time CSN West began operation, the games had not been carried on *any* regional sports network during the previous season. During that season, only a limited number of Kings games were available to the viewing public on broadcast television.<sup>74</sup> So, to begin with, Comcast’s deal with the Kings and its creation of CSN West was very much in the public interest because it brought to consumers the ability to watch many more Kings games on television than in the prior season.

DIRECTV next alleges that the manner in which CSN West has been made available to distributors is a form of “stealth discrimination.”<sup>75</sup> DIRECTV’s allegations here again do not withstand scrutiny. When CSN West was formed, the “footprint” that was established for the service was substantially identical to that of FSN Bay Area. Because of league-imposed restrictions, however, as with FSN Bay Area, the area in which CSN West is authorized to distribute the Kings’ games is smaller than the network’s overall footprint. Due in large part to this fact, CSN West established three territories consistent with the customary practice of other RSNs. As with most RSNs that carry NBA games, there is an “inner zone” (generally the area within 75 miles from the Kings’ arena) which has the highest per-subscriber prices. Next is an “outer zone,” which extends to the rest of the NBA-permitted Kings territory. The outer zone was established with a lower per-subscriber price, reflecting the fact that, while the Kings

---

<sup>73</sup> *Id.* at 18.

<sup>74</sup> Singer Declaration ¶ 7.

<sup>75</sup> Surreply at 9.

games are available, interest may not be as high as in the inner zone. Finally, there is an “outer outer zone,” comprising the remainder of CSN West’s footprint (including the San Francisco Bay Area) and constituting the area in which Kings games cannot be shown. This zone has the lowest per-subscriber price.<sup>76</sup>

DIRECTV does not take issue with the establishment of different pricing zones, or even with the price charged for the service in each of the three zones.<sup>77</sup> Rather, DIRECTV claims that the fact that CSN West does not allow any of its distributors to pick and choose the areas in which they must distribute the service is a discriminatory requirement, even though other RSNs, such as Altitude, have similar carriage requirements. The facts are that some MVPDs agreed to CSN West’s carriage terms. Others did not. For example, Charter Communications declined to carry CSN West, due in large part, Comcast believes, because it would prefer to distribute the service to some, but not all, of its cable systems within the CSN West footprint.<sup>78</sup> DIRECTV agreed to CSN West’s carriage terms, but subsequently took the view that it should not have to carry CSN West in the “outer outer zone.” DIRECTV apparently believes that any carriage term it does not like is “discriminatory,” even if that term is applied uniformly to all distributors. The salient point is that CSN West applied the carriage requirement on a non-discriminatory basis to all MVPDs.

***SportsNet New York.*** Finally, DIRECTV makes the vague claim that SportsNet New York, which will be launched in 2006 and will include carriage of New York Mets

---

<sup>76</sup> Singer Declaration ¶ 8.

<sup>77</sup> It should be noted that, with respect to the Kings, CSN West provides higher quality programming than did FSN Bay Area. For example, CSN West provides additional games previously not carried by FSN Bay Area. CSN West also provides more high-definition games at no incremental cost to the operator or consumer.

<sup>78</sup> Singer Declaration ¶ 9.

baseball games, will “on a cost per game per subscriber” basis be the “nation’s most expensive RSN programming.”<sup>79</sup> Comcast and Time Warner believe that the pricing for the service is reasonable and comparable to what MVPDs would have paid for the programming under any renewed agreement between the Mets and the network that previously carried the Mets – and is certainly within the range of what RSNs typically charge today for their services. Indeed, the network will be priced below the rate for the competing YES Network in the same footprint, and will carry college sports programming as well as the Mets.<sup>80</sup> Again, DIRECTV’s vague allegations of discriminatory or unreasonable pricing simply do not stand up in the face of the facts.<sup>81</sup>

**D. The Conduct DIRECTV Criticizes Occurs Even in the Absence of Vertical Integration**

DIRECTV also claims that, as a result of increased clustering, the Applicants will engage in all sorts of “anticompetitive” behavior with respect to RSNs. Yet, the past actions of DIRECTV’s parent, News Corp., completely undermine DIRECTV’s theory that regional concentration affords cable operators some unique advantage in the marketplace for RSN programming that is unavailable to DIRECTV or to News Corp. Without owning a single cable system or, in many instances, serving a single MVPD subscriber (since many of the following examples pre-date News Corp.’s acquisition of DIRECTV), News Corp. has successfully engaged in the very types of rough and tumble competitive behavior that DIRECTV decries in its Surreply: signing sports teams away

---

<sup>79</sup> Surreply at 9.

<sup>80</sup> Singer Declaration ¶ 10.

<sup>81</sup> A related issue raised in DIRECTV’s Surreply concerns the alleged impact of the Transactions on the Applicants’ ability and incentive to uniformly raise the price of affiliated programming to the disadvantage of competing MVPDs. Surreply at 12. Again, real world examples of marketplace behavior indicate that the use of uniform rate increases by vertically-integrated programmers is not an issue that is unique to these Transactions. Just recently, it has been reported that less than two years after acquiring DIRECTV, News Corp. is proposing a fourfold increase in the price charged for the Fox News Channel. R. Thomas Umstead, “Fox News: Fair, Balanced and Pricey,” Multichannel News (Oct. 31, 2005) at 6.

from incumbent RSNs and raising RSN prices. These facts are obviously well known to DIRECTV.

***“Luring” sports teams away from incumbent RSNs.*** DIRECTV alleges that Applicants “would use their enhanced market power to wrest control over additional RSN programming.”<sup>82</sup> Wooing teams away from an incumbent RSN is a tactic with which News Corp. is intimately familiar – and a tactic News Corp. has employed without the benefit of a single cable cluster or even a single MVPD subscriber. News Corp.’s behavior in Detroit in 1997 highlights the point. After attempting unsuccessfully to acquire the incumbent RSN, Pro-Am Sports Systems (“PASS”),<sup>83</sup> News Corp. set about to lure the Tigers, Pistons, and Red Wings away from PASS.<sup>84</sup> Within three months, News Corp. had locked up the TV rights to the three Detroit teams, driven PASS out of business, and launched its own service, Fox Sports Net Detroit.<sup>85</sup> According to one press account of the entire episode: “Fox essentially bought the marketplace from PASS. After wooing the Wings and Pistons, Fox left PASS owner Post-Newsweek little choice but to relinquish rights to the Tigers and close up shop after 13 years of operation.”<sup>86</sup>

---

<sup>82</sup> Surreply at 7.

<sup>83</sup> PASS, owned by Post-Newsweek and founded by late Detroit Tigers owner John Fetzer, had been a fixture in Detroit for more than a decade. *See* Steve Crowe, *Fox Sports Gobbles Up PASS*, Detroit Free Press, Aug. 28, 1997, at 1E.

<sup>84</sup> Steve Crowe, *Fox Sports Detroit Debuts on Area Cable*, Detroit Free Press, Sept. 17, 1997, at 1D. According to press reports, “[a]dding Detroit was considered a must for Fox, which need[ed] such exposure to lure the auto industry’s advertising millions to its several broadcast branches.” *Id.*

<sup>85</sup> News Corp. (through its affiliate Fox Sports) first acquired the TV rights to the Pistons for a reported \$3 million to \$4 million per season, far more than PASS had paid and an amount that PASS could not match. Fox Sports then set its sights on the remaining two Detroit teams and within a matter of weeks had acquired the TV rights to the Red Wings, the reigning Stanley Cup champions at the time and a proven ratings-getter in the Detroit area. Once that deal was completed, PASS quickly concluded it was no longer financially viable and agreed to sell its rights to Tigers games to Fox Sports in August 1997. Fox Sports Net Detroit was launched in September of that year and PASS went off air shortly thereafter. For a detailed description of Fox Sports’ aggressive pursuit of the Detroit sports’ rights, see *id.* *See also* Steve Crowe, *They’ll PASS: Pistons Opt for New Fox Cable-TV Deal*, Detroit Free Press, July 1, 1997, at 2D.

<sup>86</sup> Crowe, *supra* note 84 at 1D.

***Increasing RSN prices.*** DIRECTV also alleges that the Transactions will create or enhance the Applicants' incentives to raise prices for RSN programming.<sup>87</sup> Here again, News Corp.'s own behavior (pre-dating its acquisition of DIRECTV) illustrates that RSNs are driven by forces unrelated to vertical integration to seek creative means of maximizing their revenues.

For example, Fox Sports Net West ("FSN West"), which is jointly owned by News Corp. and Liberty Media,<sup>88</sup> was a very successful RSN, with distribution to approximately 4.3 million homes on 175 cable systems in and around Los Angeles.<sup>89</sup> In the late 1990s, Fox Sports developed a strategy to boost its revenues in the lucrative Los Angeles market. Rather than merely drawing license fees from a single RSN, it decided to launch a second RSN, dubbed Fox Sports West 2 ("FSN West 2"), to create a second revenue stream.<sup>90</sup> Fox Sports moved some, but not all, of the highly popular sports programming previously found on FSN West to the new "spinoff" channel. As a result, MVPDs that once could obtain all local sports programming from a single RSN either had to pay an extra \$0.75 license fee for FSN West 2 (in addition to the \$1.00 license fee for FSN West), or risk alienating subscribers by not carrying a large number of local games.<sup>91</sup> Eventually, most MVPDs elected to pay the license fee and carry the new RSN, and today, FSN West and FSN West 2 are both widely distributed throughout the greater

---

<sup>87</sup> See Surreply at 11-14.

<sup>88</sup> Jon Lafayette, *Murdoch Seeks a Baseball Deal*, Electronic Media, May 19, 1997, at 48.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* The launch of FSN West 2 predated News Corp.'s purchase of the Los Angeles Dodgers later in 1997.

<sup>91</sup> According to the Los Angeles Times, cable operators were being "strong-armed" into carrying FSN West 2 and "asked to pay for a new channel that [was] little more than the old channel split in half." Larry Stewart, *A Splitting Headache; Spinoff Fox Sports West 2 Creates More Problems for Cable Operators*, Los Angeles Times, Jan. 27, 1997, at C1. Many California cable operators were angered by News Corp.'s "attempt to land channel positions for both Fox Sports West and [Fox Sports West] 2 by spreading around its coverage of the Dodgers and the Mighty Ducks" and refused to pick up the second channel. Greg Spring, *The Insider*, Electronic Media, May 19, 1997, at 8.

Los Angeles area, and draw monthly license fees of \$1.84 and \$1.56, respectively, per subscriber.<sup>92</sup>

The above examples demonstrate not only that News Corp. is a potent competitor for sports rights, but also that the ability to acquire and protect those rights is completely unrelated to cable system clustering or vertical integration. They also underscore the dynamic nature of today's RSN marketplace. News Corp. and DIRECTV may wish to perpetuate the "old guard" with News Corp. as the leading provider of RSN programming. But the reality of today's marketplace is that parties will drive hard bargains to buy, acquire, defend, or exploit regional sports programming rights – whether those parties are News Corp., other program packagers or distributors, or sports teams themselves. There is a word to describe these developments: competition. And while placing DIRECTV's proposed restrictions on Comcast and Time Warner would certainly protect News Corp.'s leading position in the RSN business, it has nothing to do with the Commission's public interest review of the Transactions.

**E. Lexecon's Findings on DBS Penetration are Fundamentally Flawed**

To support its call for Commission action, DIRECTV also points to the anonymous Lexecon study that purports to show that "DBS operators achieve significantly less penetration in markets where they lack RSN programming."<sup>93</sup> As a preliminary matter, however, lower DBS penetration standing alone does not equate to an injury to competition. Indeed, Dennis Carlton, the President of Lexecon, and Gustavo Bamberger, the co-author of the "Statement" submitted with DIRECTV's initial Comments, have previously argued on DIRECTV's behalf that "[i]n Philadelphia,

---

<sup>92</sup> See Surreply, Lexecon Report, at Table 2 (filed Oct. 24, 2005).

<sup>93</sup> Surreply, Lexecon Report at 4.

Comcast's Philadelphia SportsNet is exclusively available from terrestrial cable systems and not from DIRECTV or Echostar. Yet both DBS companies continue to provide service in Philadelphia."<sup>94</sup> The anonymous Lexecon study does not purport to demonstrate any link between DBS penetration rates and competitive injury – for example, that cable customers pay higher quality-adjusted prices in areas of lower DBS penetration.

Indeed, it is highly disingenuous for DIRECTV to discuss the effect of exclusivity on DBS operators without discussing the significant benefits that it has obtained from its own exclusivity agreements – of which NFL Sunday Ticket<sup>95</sup> is only the most prominent example.<sup>96</sup> Through its proposed conditions, DIRECTV is effectively trying to use this proceeding to hobble the ability of competitors to respond to its own moves – for example, in response to DIRECTV's far more significant NFL exclusivity. Given that the Transactions will not cause any significant changes in the ability or incentives of Comcast or Time Warner Cable to obtain exclusivity, any Commission review of this issue properly belongs in an industry-wide proceeding where the agency can take *all* of the relevant factors into account.

Furthermore, as discussed in the Ordoover-Higgins Reply Declaration, the Lexecon study cannot be used to reach any conclusion regarding the impact of RSN exclusives on

---

<sup>94</sup> Dennis Carlton, Janice Halpern, and Gustavo Bamberger, "Economic Analysis of the News Corporation/DIRECTV Transaction," Appendix A to Opposition to Petitions to Deny and Reply Comments of General Motors Corporation, Hughes Electronics Corporation, and the News Corporation Limited, MB Docket No. 03-124 (July 1, 2003) at 18.

<sup>95</sup> NFL Sunday Ticket was expressly exempted from the program access conditions imposed in the *News Corp./ Hughes/ DIRECTV* proceeding. *News Corp./ Hughes/ DIRECTV Order* ¶ 127.

<sup>96</sup> DIRECTV just today launched an exclusive music channel that it states is "destined to have as much impact on the music business as the launch of MTV 25 years ago." See Press Release, "DIRECTV to Launch Its First Exclusive Original Programming Series, CD USA" (Nov. 1, 2005).



DBS penetration.<sup>97</sup> Lexecon's findings are based on an examination of "the only three large DMAs – San Diego, New Orleans, and Philadelphia – in which RSN professional sports programming is available from cable firms but not from DBS operators."<sup>98</sup>

However, two of the three DMAs that Lexecon analyzes do not support its conclusion.

More specifically, Lexecon's findings must be evaluated in light of the following factors:

- In San Diego, Lexecon itself indicates that the difference between actual and anticipated DBS penetration is not statistically significant.<sup>99</sup>
- Using New Orleans as an example of the alleged harmful effects on DBS penetration of a "cable-only exclusive" is perhaps the most egregious claim made by DIRECTV. Cox Sports Television, the New Orleans RSN, is delivered by satellite, and its web site and press reports indicate that it has always been available to DIRECTV.<sup>100</sup> While it is true that DIRECTV does not carry Cox Sports Television, the reason is not that the service has been made unavailable by a vertically integrated RSN, but that DIRECTV has chosen not to carry the service. Indeed, a DIRECTV representative has been quoted as stating that it "has no plans to seek deals with Cox for the Hornets," noting that "subscribers haven't even asked for the channel."<sup>101</sup> Thus, New Orleans is not a DMA in which DBS operators "lack RSN programming"; rather, they have simply chosen not to acquire programming that is available to them. It is highly unlikely that DIRECTV would deliberately choose not to carry Cox Sports Television if, as Lexecon claims, the lack of this RSN significantly hurts DIRECTV's penetration in the New Orleans area.

In short, Lexecon's model validates its conclusion in only one out of the three DMAs analyzed, and, therefore, if anything, only supports a finding that "cable-only" exclusives have no conclusive impact on DBS penetration.

---

<sup>97</sup> Ordoover/Higgins Reply Decl. ¶ 12.

<sup>98</sup> Lexecon Report, Appendix A at 1.

<sup>99</sup> *Id.* at 6.

<sup>100</sup> "About Cox Sports Television:

Overview," <<http://www.coxsportstv.com/About.aspx?page=About&About=Overview>> (last visited Oct. 23, 2005) ("CST is satellite delivered ... and available to all distributors within a 350 mile radius of New Orleans, La."). See also "Sports Nets Get Closer to Home," Cable World, (Jan. 6, 2003). ("Cox Sports Television is a satellite service - legally bound to be available to DBS operators.") Cox Sports Television only carries a single professional sports team (the NBA Hornets).

<sup>101</sup> *Id.*

Not only is the Lexecon study inconclusive, but it also suffers from more general flaws that cast doubts on the validity of the conclusions reached. For example:

- Lexecon omits numerous factors that are relevant to any model designed to predict DBS penetration levels, including average cable system quality (*e.g.*, a common, but imperfect, measure of quality is the total number of channels offered or the number of premium channels offered) and average cable prices.<sup>102</sup>
- All the Lexecon model shows is that three DMAs had at one point in time (March 2005), on average, relatively lower DBS penetration as compared to a benchmark group. The small number of instances of cable-only exclusives in the data used by Lexecon makes it especially difficult to isolate the effect of cable exclusivity on DBS penetration. Indeed, these penetration rates are likely to be influenced by many DMA characteristics unrelated to the cable-only exclusive as well as on a variety of historical factors (beyond just when DBS introduced local-into-local service). For these reasons, it would be inappropriate to place any weight on the Lexecon analysis.<sup>103</sup>
- The Lexecon model also appears to suffer from an endogeneity problem with respect to the explanatory variables. Rather than cable-only exclusives causing low DBS penetration rates, it may be that low DBS penetration rates cause RSNs and cable providers to enter into cable-only exclusives.<sup>104</sup>
- Finally, Lexecon provides little evidence that it applied the standard diagnostic tools (*i.e.*, sensitivity runs and diagnostic tests to determine the robustness and accuracy of the econometric model) to ensure that the results presented in the report are sufficiently reliable.<sup>105</sup>

In sum, the Lexecon analysis of DBS penetration is both inconclusive on its face and suffers from such significant flaws that even those determinations it does reach cannot be given any credence.

---

<sup>102</sup> Ordoover-Higgins Reply Decl. ¶ 6.

<sup>103</sup> *Id.* ¶¶ 5, 9.

<sup>104</sup> *Id.* ¶ 10. If DBS penetration is low in a particular area, the costs of a cable-only exclusive are lower in terms of lost subscriber license fee revenue. While it is true that the benefits of a cable-only exclusive are also smaller in such a case, uncertainty may play a key role. An RSN knows with *certainty* the subscriber fees that it will lose as a result of an exclusive strategy, but the cable provider has a relatively high degree of *uncertainty* about how many subscribers will switch to it. Because firms are often more willing to gamble when the downside risk is smaller (*i.e.*, a lower level of lost potential subscriber fee revenue), the lower DBS penetration rate may induce more cable-only exclusives.

<sup>105</sup> *Id.* ¶ 11.

#### IV. DIRECTV'S REMAINING CONTENTIONS LACK MERIT.

As shown above, the Transactions differ fundamentally from the *News Corp./Hughes/DIRECTV* merger in that their effect on the Applicants' incentives with respect to RSN programming is *de minimis*. In this regard, DIRECTV's allegation that Applicants make two erroneous assertions in their attempts to distinguish the instant Transactions from those in the *News Corp./Hughes/DIRECTV* merger proceeding is easily refuted. First, DIRECTV accuses Applicants of "argu[ing] that the program access rules apply here but did not apply there."<sup>106</sup> That is incorrect. Rather, Applicants stated that the "creation of a vertical relationship between News Corp. and DIRECTV, *standing alone*, would not have subjected News Corp.'s satellite-delivered programming services"<sup>107</sup> to program access restrictions. The *News Corp./Hughes/DIRECTV* transaction created a new vertical combination of the largest nationwide DBS carrier (DIRECTV) and a leading provider of satellite-delivered video programming networks (News Corp.) which, absent the Liberty interest in News Corp., would have been free of all program access restrictions. News Corp. and DIRECTV admitted this in their merger application and *volunteered* to be subject to the program access rules post-merger. In contrast, the instant Transactions involve cable operators already subject to the program access rules and are purely horizontal in nature, resulting in little change in ownership levels nationally and no new attributable vertical ownership arrangements with RSNs or any other programming services.

Second, DIRECTV questions Applicants' assertion that "a cable operator cannot lawfully engage in temporary withholding of affiliated programming unless it migrates

---

<sup>106</sup> Surreply at 16.

<sup>107</sup> Reply at n. 158 (emphasis added).

the programming to a terrestrial network.”<sup>108</sup> Specifically, DIRECTV alleges that Applicants can stall negotiations, thereby withholding programming until a deal is reached. What DIRECTV fails to explain is how this issue could be specific to these Transactions. To reiterate, Comcast and Time Warner will gain no new attributable interests in any video programming networks as a result of these Transactions. Because the proposed Transactions do not significantly alter the incentives of Comcast and Time Warner, it follows that DIRECTV must be contending that Comcast and Time Warner can temporarily withhold their *current* programming by stalling negotiations. However, DIRECTV cannot point to any evidence that either Comcast or Time Warner or their affiliated programmers currently engage in such behavior. To be clear, Comcast and Time Warner adamantly deny that they condone such activities. Both companies take their program access responsibilities seriously.

Moreover, DIRECTV has not demonstrated, and cannot demonstrate, that the program access rules are inadequate to address situations where DIRECTV believes a programmer is intentionally stalling the negotiation process to engage in a temporary withholding strategy. The Commission’s rules clearly outline the rights of an MVPD that believes it has a program access issue, and DIRECTV has availed itself of the program access rules when it has been dissatisfied with negotiations in the past.<sup>109</sup> What DIRECTV is really asking the Commission to do in this proceeding is to interfere with negotiating processes that conform to industry norms for DIRECTV’s own benefit. The Commission should reject that request.

---

<sup>108</sup> Surreply at 16 (citing Reply at 60).

<sup>109</sup> See, e.g., DIRECTV, Inc. v. iN DEMAND, LLC, Program Access Complaint, File No. CSR-6901-P (filed June 29, 2005).

## V. CONCLUSION

For the foregoing reasons and those stated in the Applications and Reply, the Commission should reject DIRECTV's request that it impose broad, overreaching, and non-transaction-specific conditions upon the Transactions. The Applicants respectfully request that the Commission unconditionally and promptly approve the Applications.

### ADELPHIA COMMUNICATIONS CORPORATION

By: /s/ Michael H. Hammer  
Brad Sonnenberg  
James N. Zerefos  
*Adelphia Communications Corp.*  
*5619 DTC Parkway*  
*Denver, CO 80111*

Philip L. Verveer  
Michael H. Hammer  
Francis M. Buono  
*Willkie Farr & Gallagher LLP*  
*1875 K Street, N.W.*  
*Washington, DC 20006*

Dated: November 1, 2005

### COMCAST CORPORATION

By: /s/ James R. Coltharp  
Joseph W. Waz, Jr.  
James R. Coltharp  
*Comcast Corporation*  
*2001 Pennsylvania Ave., N.W.*  
*Washington, DC 20006*

### TIME WARNER INC.

By: /s/ Steven N. Teplitz  
Steven N. Teplitz  
Susan A. Mort  
*Time Warner Inc.*  
*800 Connecticut Ave., N.W.*  
*Washington, DC 20006*

Aaron I. Fleischman  
Arthur H. Harding  
Seth A. Davidson  
Craig A. Gilley  
*Fleischman and Walsh, L.L.P.*  
*1919 Pennsylvania Ave., N.W.*  
*Washington, DC 20006*

## **EXHIBIT A**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>In the Matter of</b>	)	
	)	
Applications for Consent to the Assignment	)	
and/or Transfer of Control of Licenses	)	
	)	
Adelphia Communications Corporation	)	
(and subsidiaries, debtors-in-possession), Assignors,	)	
to	)	
Time Warner Cable Inc. (subsidiaries), Assignees;	)	
	)	MB Docket No. 05-192
Adelphia Communications Corporation	)	
(and subsidiaries, debtors-in-possession),	)	
Assignors and Transferors,	)	
to	)	
Comcast Corporation (subsidiaries),	)	
Assignees and Transferees;	)	
	)	
Comcast Corporation, Transferor,	)	
to	)	
Time Warner Inc., Transferee;	)	
	)	
Time Warner Inc., Transferor,	)	
to	)	
Comcast Corporation, Transferee.	)	

**REPLY DECLARATION OF**

**JANUSZ A. ORDOVER**

**AND**

**RICHARD S. HIGGINS**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>In the Matter of</b>	)	
	)	
Applications for Consent to the Assignment	)	
and/or Transfer of Control of Licenses	)	
	)	
Adelphia Communications Corporation	)	
(and subsidiaries, debtors-in-possession), Assignors,	)	
to	)	
Time Warner Cable Inc. (subsidiaries), Assignees;	)	
	)	MB Docket No. 05-192
Adelphia Communications Corporation	)	
(and subsidiaries, debtors-in-possession),	)	
Assignors and Transferors,	)	
to	)	
Comcast Corporation (subsidiaries),	)	
Assignees and Transferees;	)	
	)	
Comcast Corporation, Transferor,	)	
to	)	
Time Warner Inc., Transferee;	)	
	)	
Time Warner Inc., Transferor,	)	
to	)	
Comcast Corporation, Transferee.	)	

**REPLY DECLARATION OF JANUSZ A. ORDOVER AND RICHARD HIGGINS**

1. We have been asked by counsel for Comcast Corporation (“Comcast”) to review the Lexecon report, entitled “Analysis of Potential Anticompetitive Effects of the Proposed Adelphia/ Comcast/ Time Warner Transactions,” submitted by DIRECTV as an attachment to its Surreply in this proceeding. In particular, we have been asked to review the econometric analysis entitled “Analysis of Effect of RSN Availability on DBS Penetration,” submitted as Appendix A to the Lexecon report.



2. We previously submitted a Declaration in this proceeding with the Reply Comments of Comcast, Time Warner, and Adelphia on August 5, 2005.<sup>1</sup> Our qualifications are described in that Declaration.<sup>2</sup>

3. Lexecon purports to show that in three DMAs (Philadelphia, San Diego and New Orleans) where an RSN is carried exclusively by cable operators, DBS penetration is lower than would be expected based solely on the selected characteristics of the DMA.<sup>3</sup> The gap between the expected DBS penetration in these DMAs and the observed DBS penetration rate is then attributed to the fact that the RSN is not carried by DBS. In this Reply Declaration, we evaluate the interpretation, structure, and specification of the econometric analysis presented by Lexecon.

4. As a preliminary matter, we note that Lexecon never ties its analysis to the central question of any merger case: whether the proposed transactions will significantly harm competition in any relevant market. In particular, Lexecon does not claim to, or attempt to, show that the cable-only exclusives result in harm to competition in any of the DMAs it studied. For example, there is no evidence presented that quality-adjusted cable prices are higher or service quality lower in areas with cable-only exclusives. Indeed, Dennis Carlton, the President of Lexecon, and Gustavo Bamberger, the co-author of the “Statement” submitted with DIRECTV’s initial Comments in this proceeding, have previously argued on DIRECTV’s behalf that “[i]n Philadelphia, Comcast’s Philadelphia SportsNet is exclusively available from terrestrial cable systems

---

<sup>1</sup> Janusz A. Ordoover and Richard S. Higgins, “Declaration of Janusz A. Ordoover and Richard S. Higgins,” August 5, 2005 (“Ordoover/Higgins Declaration”).

<sup>2</sup> See Ordoover/Higgins Declaration at ¶¶ 1-7.

<sup>3</sup> Lexecon, “Analysis of Effect of RSN Availability on DBS Penetration,” October 12, 2005.

and not from DIRECTV or Echostar. Yet both DBS companies continue to provide service in Philadelphia.”<sup>4</sup>

5. Apart from these more general problems, the Lexecon model falls short of the standards normally employed in rigorous quantitative analysis. Below, we draw several fundamental conclusions about the Lexecon econometric model:

- First, for the reasons described below, the Lexecon model is a blunt instrument for assessing the impact of a cable-only exclusive on DBS penetration. In fact, the Lexecon model has little to say about cause and effect and is unable to differentiate the impact of the cable-only exclusive from other factors not included in the model that influence DBS penetration (e.g., the average quality of the local cable system). All the Lexecon model shows is that the three DMAs mentioned above had at one point in time (March 2005), on average, relatively lower DBS penetration as compared to the benchmark group. The model also fails to take into account the quality of the sports programming, and the general appeal of the sports teams in the community. Perhaps a study that would try to gauge how much DBS penetration is affected by RSN cable exclusives could be of some interest, but the Lexecon report is not such a study because it ignores critical variables and its results are based on only three observations, each displaying very different patterns and degree of statistical significance.<sup>5</sup>
- Second, even if the Lexecon results were correct, they cannot be used as evidence that the Comcast-Adelphia-Time Warner transactions would harm competition and viewers. Lexecon has not evaluated whether the proposed transactions would result in (a) more cable-only exclusives (e.g., their analysis simply takes as given the cable-only exclusives); or (b) a harm to competition (such as, higher cable prices, lower service quality, or fewer innovative products). Lexecon is silent on what factors may explain when cable-only exclusives exist and on whether there are any pro-competitive benefits from such exclusives (e.g., stronger incentives to promote the RSN and invest in the team).<sup>6</sup>

---

<sup>4</sup> Dennis Carlton, Janice Halpern, and Gustavo Bamberger, “Economic Analysis of the News Corporation/DIRECTV Transaction,” Appendix A to Opposition to Petitions to Deny and Reply Comments of General Motors Corporation, Hughes Electronics Corporation, and the News Corporation Limited, MB Docket No. 03-124 (July 1, 2003) at 18. Lexecon, in various reports authored by Professor Dennis Carlton and others, argued vigorously in the *News Corp./Hughes/ DIRECTV* matter against precisely the types of vertical foreclosure and discrimination arguments that Lexecon now anonymously advances in this proceeding.

<sup>5</sup> Lexecon finds that Philadelphia has a DBS penetration rate that is 10.5 percent less than predicted by the model. By comparison, in New Orleans, the actual penetration rate is eight percent less than predicted, and in San Diego only three percent less than predicted. All of these findings flow from a rather rudimentary model linking penetration to a short and incomplete list of explanatory variables.

<sup>6</sup> For example, Lexecon observed cable-only exclusives in only a handful of DMAs despite the fact that there are numerous DMAs in which the largest cable operator has a subscriber share in excess of 60 percent. Lexecon’s model fails to explain why, if Lexecon’s conclusions are correct, we do not see cable-

- Finally, as a purely technical matter, there is no way to assess the quality of Lexecon’s findings because Lexecon does not report any robustness or diagnostic tests on the econometric model.

We now discuss each of these main conclusions in more detail.

6. First, the Lexecon model may suffer from “omitted variable bias.”<sup>7</sup> The model does not include any measure of average cable system quality (e.g., common, but imperfect, measures of quality are the total number of channels offered or the number of premium channels offered) or average cable prices. Presumably, all other things being equal, the higher is cable system quality, the lower is DBS penetration; and the higher are cable prices, the higher is DBS penetration. For example, suppose that cable systems in San Diego were, on average, of much higher quality than the average cable system across the country. The fact that DBS penetration is lower in San Diego would (at least in part) reflect the fact that cable systems are better there.

7. Second, in both of Lexecon’s runs there are other DMAs in which cable-only exclusives for RSNs were not an issue, but actual DBS penetration still fell below the predicted cable penetration by as much or more than in the three DMAs analyzed by Lexecon. This strongly suggests that some variable not included in Lexecon’s model has a significant effect on DBS penetration. As noted above, the resulting “omitted variable” bias indicates that placing any policy weight on Lexecon’s results would be in error.

8. In addition, Lexecon does not account for the fact that the magnitude of the effects of exclusives on DBS penetration will depend on the ability of DBS to

---

only RSN exclusives in these other DMAs. One reason, of course, is that the vast majority of RSNs that are vertically integrated with a cable operator are delivered via satellite and thus prohibited from entering into a cable-only exclusive by the program access rules. Lexecon simply ignores the fact that the program access rules will prevent cable-only exclusives in most markets.

<sup>7</sup> We note that it “*may*” suffer from omitted variable bias because we cannot test the impact of including additional control variables on the model results.

implement effective counterstrategies designed to maintain penetration. The more effective are such counterstrategies, the weaker will be the incentive to implement an exclusive.

9. Third, the small number of instances of cable-only exclusives in the data used by Lexecon makes it especially difficult to isolate the effect of cable exclusivity on DBS penetration. Indeed, these penetration rates are likely to be influenced by many DMA characteristics unrelated to the cable-only exclusive as well as on a variety of historical factors (beyond just when DBS introduced local-into-local service). For example, as discussed above, average cable system quality or average cable prices could influence penetration rates. For these reasons, it would be inappropriate to place any weight on the Lexecon analysis.

10. Fourth, the Lexecon model may suffer from the “endogeneity problem.”<sup>8</sup> Lexecon asserts that its results show that cable-only exclusives cause low DBS penetration rates. However, those results may simply be demonstrating that low DBS penetration rates cause RSNs and cable providers to enter into cable-only exclusives. If DBS penetration is low in a particular area, the costs of a cable-only exclusive are lower in terms of lost subscriber license fee revenue. While it is true that the benefits of a cable-only exclusive are also smaller in such a case, uncertainty may play a key role. An RSN knows with *certainty* the subscriber fees that it will lose as a result of an exclusive strategy, but the cable provider has a relatively high degree of *uncertainty* about how

---

<sup>8</sup> Endogeneity refers to the situation where the dependent variable and one or more independent variables are related through “mutual causation.” For example, the Lexecon model assumes that cable-only exclusives independently cause lower DBS penetration. But if the level of DBS penetration influences whether a firm implements a cable-only exclusive – that is, the causation goes in the opposite direction to what is assumed by Lexecon – the model may suffer from endogeneity. If this case applied here, the cable exclusive coefficients for New Orleans, San Diego and Philadelphia would be biased.

many subscribers will switch to it. Since firms are often more willing to gamble when the downside risk is smaller (i.e., a lower level of lost potential subscriber fee revenue), the lower DBS penetration rate may induce more cable-only exclusives.

11. Finally, economists use a variety of sensitivity runs and diagnostic tests to determine the robustness and accuracy of an econometric model. Lexecon provides little evidence that it applied the standard diagnostic tools to ensure that the results presented in the report are sufficiently reliable. Lexecon does not present the necessary diagnostics to determine whether any econometric specification problems exist, which makes it impossible for us to assess the precision of Lexecon's regression coefficient estimates.

12. In summary, Lexecon's econometric model may be defined incorrectly in a number of ways, as described above. Because Lexecon's model ignores certain key variables along with other econometric showings, its conclusions are unreliable. Furthermore, Lexecon's analysis fails to demonstrate that after the transaction, Comcast will have enhanced incentives or ability to implement RSN cable-only exclusives in any of the affected DMAs. Consequently, the analysis should not be used to provide the justifications for the various regulatory burdens sought by DIRECTV.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

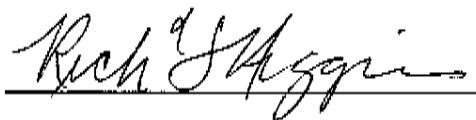
Executed on November 1, 2005.

A handwritten signature in dark ink, appearing to read "J A Ordover", written over a horizontal line.

Janusz A. Ordover

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 1, 2005.

A handwritten signature in cursive script, reading "Rich S Higgins", written over a horizontal line.

Richard S. Higgins

## **EXHIBIT B**



**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>In the Matter of</b>	)	
	)	
Applications for Consent to the Assignment	)	
and/or Transfer of Control of Licenses	)	
	)	
Adelphia Communications Corporation	)	
(and subsidiaries, debtors-in-possession), Assignors,	)	
to	)	
Time Warner Cable Inc. (subsidiaries), Assignees;	)	
	)	MB Docket No. 05-192
Adelphia Communications Corporation	)	
(and subsidiaries, debtors-in-possession),	)	
Assignors and Transferors,	)	
to	)	
Comcast Corporation (subsidiaries),	)	
Assignees and Transferees;	)	
	)	
Comcast Corporation, Transferor,	)	
to	)	
Time Warner Inc., Transferee;	)	
	)	
Time Warner Inc., Transferor,	)	
to	)	
Comcast Corporation, Transferee.	)	

**DECLARATION OF ALLAN SINGER**

1. My name is Allan Singer. My business address is 1500 Market Street, Philadelphia, Pennsylvania 19102.
2. Since August 2005, I have served as Senior Vice President of Sports-Business Development for Comcast SportsNet, which includes regional sports networks (“RSNs”) owned and operated by Comcast Corporation (“Comcast”). In that role, I am responsible for negotiating rights agreements with sports franchises on behalf of Comcast’s RSNs. I am also familiar with the business plans of those RSNs, including

their carriage and revenue estimates. I previously served as Senior Vice President of Comcast's Programming Investments Division. In that role, I negotiated the rights agreements and original affiliation agreements for, and participated in the formation of, Comcast SportsNet Chicago ("CSN Chicago"), Comcast SportsNet West ("CSN West") and SportsNet New York. Before joining Comcast in March 2003, I served as Senior Vice President of Programming for AT&T Broadband Corp. ("AT&T Broadband") and President of AT&T Broadband's programming acquisition subsidiary, Satellite Services, Inc. ("SSI").

3. I have read the allegations made in DIRECTV's filing of October 12, 2005 regarding carriage agreements for CSN Chicago and CSN West, and the pricing structure for SportsNet New York. Those allegations are without merit. I respond below in detail to each of DIRECTV's claims relating to the pricing structure of these RSNs.

4. **CSN Chicago.** DIRECTV mischaracterizes the rate structure for CSN Chicago. During its first year of operations, CSN Chicago is charging all MVPDs rates based on a three-tiered rate structure that (subject to a standard annual increase) are substantially identical to the rates charged to Comcast and other cable operators by Fox Sports Net Chicago ("FSN Chicago") for its last year of carriage. Arguably, the CSN Chicago rate is actually better than the FSN Chicago rate because CSN Chicago offers high-definition ("HD") programming at no additional charge to its distributors. FSN Chicago had not previously offered HD programming.

5. Based on my knowledge of the SSI agreement that governed Comcast Cable's carriage of FSN Chicago and a discussion I had with a DIRECTV programming executive, it is my understanding that DIRECTV had paid a different rate for FSN

Chicago than cable operators paid. I was told by that DIRECTV programming executive that some time ago DIRECTV had negotiated an agreement with Rainbow Media (“Rainbow”), the parent of FSN Chicago, which governed DIRECTV’s carriage of *all* Rainbow-affiliated sports networks nationwide. (I understand that Echostar had a similar agreement with Rainbow Media.) This contract was entered into when DIRECTV was significantly smaller than it is today, and provided for a flat payment for carriage of all of the Rainbow RSNs that applied regardless of the RSNs’ locations, the delineated territories within a specific Rainbow RSN, the number of DIRECTV subscribers to a particular RSN service, or the total number of DIRECTV subscribers that received all of the Rainbow RSNs nationwide. As a result of this and DIRECTV’s subsequent subscriber growth since the agreement with Rainbow was signed, when viewed strictly on a monthly, per-subscriber basis across each individual Rainbow RSN, the monthly, net effective rate per subscriber that DIRECTV paid for FSN Chicago was substantially below the price being paid by Comcast and other MVPDs. The gist of DIRECTV’s complaint is that it should not have to pay the same rate as every other MVPD for CSN Chicago today, but rather the highly advantageous rate it had paid previously for FSN Chicago.

6. DIRECTV now pays the standard CSN Chicago rate which is identical to what other MVPDs pay for CSN Chicago and is what such other MVPDs would have paid had they continued pursuant to their old FSN Chicago rate card. From my experience, it would be more customary for the CSN Chicago rates to have increased with the launch of a new sports network, particularly where, as here, HDTV feeds of

home games were added to the service. It is simply incorrect for DIRECTV to suggest that Comcast significantly raised prices in Chicago when it launched CSN Chicago.

7. **CSN West.** I would like to set the record straight concerning a number of incorrect or misleading statements DIRECTV made about CSN West. Comcast did not “entice” the rights to the Sacramento Kings away from anybody. Comcast acquired the rights to a television media package that includes the Sacramento Kings games, pre- and post-game and other programming from the rights holder, Sacramento Kings Limited Partnership, L.P., which games are distributed on CSN West. The Sacramento Kings games were made available as part of the television media package only after the rights holder and Fox Sports Network Bay Area were unable to reach an agreement. When CSN West began operation, Sacramento Kings’ games had not been carried on any RSN during the previous season. During that year, only a subset of Sacramento Kings’ games were available to the viewing public via broadcast television.

8. Furthermore, contrary to DIRECTV’s claims, the price for CSN West is non-discriminatory. All MVPDs are paying the same rates, as applied to the same “Territory” for CSN West. Based on restrictions imposed by the National Basketball Association, the area in which CSN West is authorized to distribute Sacramento Kings’ games is smaller than the network’s overall footprint. Due to these restrictions, CSN West established three pricing zones. Under NBA rules and customary practice, an “inner zone” 75 miles from the Kings’ arena was established with the highest per-subscriber rates. An “outer zone,” which extends to the rest of the NBA-permitted Kings territory, was established with a lower per-subscriber fee. This lower fee reflects the fact that interest in the Kings may not be as high in the outer zone as it is in the inner zone.

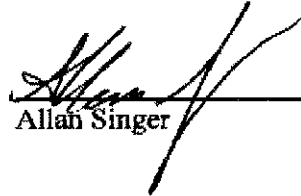
Finally, an “outer outer zone,” comprising the remainder of CSN West’s footprint (including the San Francisco Bay Area) and constituting the area in which Kings games could not be shown, was established with the lowest per subscriber rates.

9. CSN West had required all MVPDs that elected to carry its service to distribute the service to all of their subscribers within CSN West’s footprint. It is my understanding that other RSNs, such as Altitude, have similar carriage requirements. Some MVPDs agreed to CSN West’s carriage terms. Others did not. For example, Charter Communications (“Charter”) declined to carry CSN West. My understanding is that Charter would prefer to distribute the service to some, but not all, of its cable systems within the CSN West footprint. DIRECTV agreed to CSN West’s carriage terms, but subsequently took the view that it should not have to carry CSN West in the “outer outer zone.” I do not believe that the fact that DIRECTV does not like a particular carriage term that is applied uniformly to all distributors makes that term discriminatory. The salient point is that CSN West applied the carriage requirement on a non-discriminatory basis to all MVPDs.

10. ***SportsNet New York.*** DIRECTV is also incorrect in suggesting that SportsNet New York will be the “nation’s most expensive RSN programming.” In fact, the pricing for SportsNet New York is comparable to my understanding as to what MVPDs paid on a per subscriber per month basis for the programming when the Mets’ games were previously carried on the Rainbow owned RSN in the New York footprint. Also, the pricing for SportsNet New York is well within the range of what RSNs typically charge today for their services. For example, SportsNet New York will be

priced below the rate for its competitor, YES Network, in the same footprint, and will also carry college sports programming as well as the Mets.

I declare under penalty of perjury that the foregoing is true and correct. Executed  
on this 1 day of November, 2005.

  
Allan Singer